

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TRAVIS PICKERING,)	
)	
Claimant,)	
)	
v.)	IC 2004-007486
)	2005-000558
FLEETWOOD ENTERPRISES, INC.,)	
)	
Employer,)	FINDINGS OF FACT,
)	CONCLUSION OF LAW,
and)	AND RECOMMENDATION
)	
NATIONAL UNION FIRE INSURANCE)	Filed: July 27, 2007
COMPANY,)	
)	
Surety,)	
)	
and)	
)	
STATE OF IDAHO, INDUSTRIAL)	
SPECIAL INDEMNITY FUND,)	
)	
Defendants.)	
_____)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Boise, Idaho, on September 5, 2006. Claimant was present and represented by Richard S. Owen of Nampa. R. Daniel Bowen of Boise represented Employer and Surety (hereinafter "Surety"). The State of Idaho, Industrial Special Indemnity Fund was a named party to the proceedings but did not participate in the hearing, as it was limited to preliminary issues regarding medical care and income benefits. Oral and documentary evidence was presented. The record remained open for the taking of three

post-hearing depositions. The parties submitted post-hearing briefs and this matter came under advisement on April 6, 2007.

ISSUE

By agreement of the parties, the sole issue to be decided in this proceeding is Claimant's entitlement to temporary total disability (TTD) benefits.¹

CONTENTIONS OF THE PARTIES

Claimant contends that he is entitled to TTD benefits from August 16, 2005, to December 6, 2006, as the result of an injury and surgeries to his right knee.

Surety contends that it has paid Claimant the appropriate TTD benefits. Claimant was off work during the period of time for which he seeks benefits due to medical conditions unrelated to his industrial accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The testimony of Claimant taken at the hearing;
3. Claimant's Exhibits 1 and 2 admitted pursuant to the Order Granting Motion for Admission of Supplementary Documents entered on February 5, 2007;
4. Surety's Exhibits 1-16 admitted at the hearing;
5. Surety's Exhibit A admitted pursuant to Surety's Motion to Augment Evidentiary Record filed March 26, 2007; and
6. The post-hearing depositions of: Stephen Spencer, M.D., taken by Claimant on September 7, 2006; Roman Schwartsman, M.D., taken by Surety on September

¹ After the taking of post-hearing depositions and before the submission of post-hearing briefs, the parties reached an agreement regarding all medical issues.

26, 2006; and George Nicola, M.D., taken by Surety on October 5, 2006.

Claimant's objection at page 15 of Dr. Nicola's deposition is sustained and Dr. Nicola's response is stricken. All other objections are overruled.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

FINDINGS OF FACT

1. At the time of hearing, Claimant was 55 years of age and resided in Nampa with his wife of 37 years.

2. Claimant worked for Employer as a tractor driver—moving mobile homes from one plant to another and then to the sales lot, all within Employer's trailer manufacturing facility. On June 1, 2004, Claimant injured his right knee as he came down the tractor steps and turned in a twisting motion.

3. Claimant came under the care of Roman Schwartzman, M.D., an orthopedic surgeon, on June 24, 2004. Dr. Schwartzman diagnosed a torn medial meniscus and recommended a right knee arthroscopy with debridement. The procedure was accomplished on July 7, 2004. Unfortunately, Claimant developed varicosities in his right leg that interfered with his course of healing. However, on October 12, 2004, Dr. Schwartzman found Claimant to be at maximum medical improvement (MMI) and released him to return to work with certain permanent restrictions.

4. On November 11, 2004, Dr. Schwartzman suspected a recurrent medial meniscus tear and ordered a right knee MRI as well as a CT venogram to address Claimant's varicosities and to rule out any venous obstructions. On December 1, 2004, Dr. Schwartzman performed another right knee arthroscopy with posterior horn medial meniscectomy and femoral

chondroplasty. As before, Claimant's thrombophlebitic condition complicated his ability to use his right leg. Claimant was kept off work due to a combination of medical conditions, not all of which were work-related. On April 28, 2005, Dr. Schwartzman once again declared Claimant at MMI with regard to his right knee and deferred to a physiatrist for an impairment rating.

5. Claimant returned to Dr. Schwartzman on August 16, 2005, at which time Dr. Schwartzman noted:

At this point, my recommendation for the patient is that he seek social security disability based on the multiplicity of medical problems that he has going on at this time. With regard to the right knee, the degenerative changes are progressing unfortunately. The work-related meniscal injury has not progressed and as such is deemed to have remained stable.

Surety's Exhibit 5.

6. Dr. Schwartzman did not see Claimant again until August 21, 2006, at which time he noted:

The patient was noted to have progressive degenerative joint disease in the right knee at the time of the arthroscopy. The progression of the disease correlated with removal of most of his medial meniscus to address work related tears in the meniscus.

Id. Dr. Schwartzman recommended a right total knee arthroplasty to address the degenerative changes.

DISCUSSION AND FURTHER FINDINGS

7. Idaho Code § 72-408 provides for income benefits for temporary total and partial disability during an injured worker's period of recovery. "In workmen's [sic] compensation cases, the burden is on the claimant to present expert medical opinion evidence of the extent and duration of the disability in order to recover income benefits for such disability." *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980); *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791, 727 P.2d 1217, 1220 (1986). Once a claimant is medically

FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION - 4

stable, he or she is no longer in the period of recovery, and total temporary disability benefits cease. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 586, 38 P.3d 617, 624 (2001).

8. Claimant's claim for TTD benefits is grounded primarily on a letter written to his counsel by Dr. Schwartzman dated December 5, 2006, as well as his deposition testimony.

In his December 5, 2006, letter Dr. Schwartzman stated:

At this point, I consider him to be essentially disabled since he is unable to sit, stand, or walk for any length of time without undue pain in his knee. This has been going on since at least August of 2006.

Review of my notes from July and August 2005 also indicates that the patient had substantial disability attributable to his right knee. In reviewing those notes, I find that back in July 2005, the patient presented with increasing complaints of pain in the right knee and progressive limitations of activities including activity [*sic*] of daily living. He, at that point, was felt to have complete inability to perform his regular work duties. He had complaints of persistent swelling and pain in the knee, which were documented at that [*sic*] time of that exam. The pain basically was becoming progressively worse. I felt at that time that the complaints of pain in the right knee were [*sic*] continuum of the original work-related injury, and recommended a repeat MRI of the knee. Based on the review of my notes from July and August 2005, I would consider the patient to be disabled secondary to his right knee pain, going back to July and August 2005. The fact that the patient has other disabling factors is relevant only from the standpoint of his application for long-term social security disability. The primary disabling factor in this case is the right knee, which as I previously indicated goes back to at least July 2005.

Claimant's Exhibit 1.

9. Surety argues that because Claimant was not receiving treatment for his right knee between August 2005 and August 2006, he was not within a period of recovery and is therefore not entitled to TTD benefits during that time. Further, they argue that Dr. Schwartzman distinguished between the progression of Claimant's underlying degenerative condition and his work-related torn meniscus when he discussed medical stability. The Referee disagrees.

There is no question that Claimant had underlying degenerative joint disease in his right knee. Dr. Schwartzman credibly and persuasively testified that the partial meniscectomy he

FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION - 5

performed accelerated the progression of the pre-existing condition to the point that Claimant required a total knee replacement, and contributed to the knee pain that kept Claimant from working and engaging in other activities of daily living.

Surety has accepted the compensability of Claimant's total knee replacement. It is inconsistent for Surety to now argue that, if Claimant was temporarily disabled for the period he claims, such disability has nothing to do with his industrial accident.² While Claimant was not receiving treatment as such for his right knee during the period in question, there can be no doubt that he was experiencing limiting pain within his knee that prevented him from working during that time.

10. There is some merit to Surety's argument that Claimant's inability to work during the period in question was due to the natural progression of Claimant's pre-existing degenerative processes. There is also merit in Dr. Schwartzman's opinion that such progression was hastened by the partial meniscectomy that was necessitated by Claimant's industrial injury. During the period in dispute, Claimant may *also* have been suffering from a thrombophlebitic condition that contributed to his disability. There is ample medical evidence in the record that his thrombophlebitic condition was a compensable consequence of his industrial injury, and Surety has also accepted that portion of the claim.

11. Citing to his opinion rendered a year and a half after his last treatment of Claimant, Surety accuses Dr. Schwartzman of becoming Claimant's advocate in order to obtain payment for his services. Most defense-mandated independent medical evaluations (IMEs) are, of necessity, conducted after-the-fact. Defense IMEs are not presumptively devalued because

² Drs. Cox, Nicola, and Johnson offered opinions regarding whether Claimant's medical conditions were work-related, but did not express opinions regarding factors relevant to Claimant's entitlement to TTD benefits.

they occur late in the game, and the same consideration should apply here. Further, it is well known and accepted that sureties pay their IME physicians. Any physician rendering an opinion in a workers' compensation case may have a pecuniary interest in a particular outcome, but that fact alone does not lessen the value of their opinions. There is no evidence that merely because Dr. Schwartzman would like to receive payment for his services that he somehow fabricated his causation opinions.

12. The Referee finds that Claimant is entitled to TTD benefits beginning August 16, 2005, the date Dr. Schwartzman recommended Claimant “ . . . seek social security disability based on the multiplicity of medical problems that he has going on at this time.” Surety's Exhibit 5, p. 110. Those medical problems include the work-related pain in Claimant's right knee as well as his thrombophlebitis. Dr. Schwartzman's suggestion that Claimant seek social security disability benefits is a clear indication that he did not believe Claimant capable of working as of August 16, 2005. Such TTD benefits should continue to December 6, 2006, the date on which Surety accepted responsibility for Claimant's total knee replacement and commenced TTD benefits related thereto.

CONCLUSION OF LAW

Claimant is entitled to TTD benefits from August 16, 2005, to December 6, 2006, and continuing until such time as Claimant is declared at MMI from his total knee arthroplasty.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusion of law and issue an appropriate final order.

DATED this 18 day of July, 2007.

INDUSTRIAL COMMISSION

/s/_____
Rinda Just, Referee

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 27 day of July, 2007 a true and correct copy of **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

RICHARD S OWEN
PO BOX 278
NAMPA ID 83653-0278

R DANIEL BOWEN
PO BOX 1007
BOISE ID 83701-1007

KENNETH L MALLEA
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djb

/s/_____

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Claimant,)	
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STATE OF IDAHO, INDUSTRIAL)	
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Defendants.)	
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Pursuant to Idaho Code § 72-717, Referee Rinda Just submitted the record in the above-entitled matter, together with her proposed findings of fact and conclusion of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusion of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant is entitled to TTD benefits from August 16, 2005, to December 6, 2006,

and continuing until such time as Claimant is declared at MMI from his total knee arthroplasty.

2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 27 day of July, 2007.

INDUSTRIAL COMMISSION

/s/_____
James F. Kile, Chairman

/s/_____
R.D. Maynard, Commissioner

/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 27 day of July, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

RICHARD S OWEN
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/s/_____